IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2736

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

SOUTHWEST AIRLINES COMPANY, on behalf of itself and all others similarly situated,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 750—**James B. Zagel**, *Judge.*

ARGUED JANUARY 10, 1997—DECIDED MARCH 20, 1997

Before POSNER, *Chief Judge*, and RIPPLE and ROVNER, *Circuit Judges.*

POSNER, *Chief Judge.* Section 4261 of the Internal Revenue Code required airline passengers to pay a 10 percent excise tax on domestic air transportation commenced on or before December 31, 1995, and required the airlines to collect the tax from its customers, 26 U.S.C. § 4291, and remit the proceeds twice a month to the Internal Revenue Service. 26 C.F.R. § 40.6302(c)-1(b)(1)(i). Failure to collect and remit would have subjected the airlines to heavy penalties. 26 U.S.C. §§ 6672, 7202, 7501. In mid-December 1995, shortly after the President had vetoed

a bill that would have extended the excise tax into 1996, Robert Kaucky bought two tickets from Southwest Airlines for travel in January 1996. The price that he paid included the 10 percent excise tax. Apparently Southwest remitted the amount it received from Kaucky for the fax to the IRS, although this is not absolutely certain. Kaucky was not subject to the tax, because his tickets were not for travel on or before December 31, 1995.

Kaucky brought suit in an Illinois state court, on behalf of himself and others who had bought tickets from Southwest in 1995 but not flown until 1996, against Southwest, seeking on grounds of conversion and breach of contract the recovery of the money that they had paid to the airline in respect of the nonexistent tax. He purported to sue Southwest not only in its own right but also as a representative of all other airlines that had engaged in the same practice. Defendant classes are sometimes permitted under both federal and state law (remember this case began in state court). Fed. R. Civ. P. 23(a); 735 ILCS 5/2-801; 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1770 (2d ed. 1986). Given the relatively small number of airlines and (as we shall see) the disparity in their handling of the expired tax, it is doubtful that defendant class action treatment would be appropriate here. In any event no class was certified, and we shall therefore treat this as a suit against Southwest alone.

Southwest removed the case to federal district court on the ground that the plaintiff and his class were really seeking a refund of federal taxes. That would make this a suit arising under federal law (and hence removable under 28 U.S.C. § 1441(b)), specifically the Internal Revenue Code, which authorizes claims against the Internal Revenue Service, and, if the claims are denied, suits in federal court against the United States, for the recovery of any federal tax alleged to have been erroneously or illegally assessed or collected. 26 U.S.C. § 7422(a); 28 U.S.C. § 1346(a)(1). The district judge agreed that Kaucky's suit actually arose under federal law, and therefore denied the

plaintiff's motion to remand the case to the state court. He then dismissed the suit because a suit for the refund of federal taxes may be brought only against the government, and not against a private person. *Columbia Marine Services, Inc. v. Reffet Ltd.*, 861 F.2d 18, 22 (2d Cir. 1988); see also 26 U.S.C. § 7422(f)(1); *Edgar v. Inland Steel Co.*, 744 F.2d 1276, 1278 (7th Cir. 1984) (per curiam). Kaucky had not only not sued the government; he had not filed a claim for refund, which is a precondition to bringing such a suit. 26 U.S.C. § 7422(a); *Kuznitsky v. United States*, 17 F.3d 1029, 1031 (7th Cir. 1994). Of course if Kaucky were not the taxpayer—if Southwest were—he could not ask for a refund or bring a refund suit. But the airline passenger is the taxpayer, 26 U.S.C. § 4261(d), and is entitled to a refund or credit if he pays a tax that he does not owe, §§ 6401(c), 6402(a); the question is whether in suing Southwest, passenger-taxpayer Kaucky was seeking a tax refund.

If he was, the suit was properly removed to the district court despite the plaintiff's effort to base the suit on state law grounds and his failure to name the United States as the defendant. When federal law creates an exclusive remedy for some wrong, displacing any remedy that the states may have created for it, a suit to redress that wrong necessarily arises under federal law. There is no state law for it to arise under because the state law that the plaintiff thought he was suing to enforce has been pushed to one side, and replaced, by the federal law. *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1487 (1995); *English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341, 1344-45 (7th Cir. 1986). But if this is not a suit for a refund of taxes, then removal was improper even if Southwest has a defense based on federal law. *Caterpillar, Inc. v. Williams, supra*, 482 U.S. at 393; *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993).

In a literal sense this is not a suit for a refund of taxes, because the plaintiff and the members of his class never

paid the air transportation excise tax. Money was collected from them to pay the tax if and when it was imposed on air travel taking place in 1996; but the tax was not imposed. Even if (as we assume) Southwest remitted the money it collected on account of the excise tax to the Internal Revenue Service, this did not automatically transform the money that it had collected into a "tax." Not all the money that the Internal Revenue Service receives is tax; it receives an annual appropriation from Congress, as well; and no doubt from time to time some deluded taxpayer sends in money for the payment of a tax that, unbeknownst to him, has expired.

But we do not think the literal sense is the right sense. If it were, then anytime a taxpayer thought he could prove that his employer had erroneously withheld a portion of his salary for federal income tax he would have an action in state court against the employer. The state court might side with the taxpayer and order the employer to refund him the money. The federal government, not having been sued in the state court—indeed not having consented to be sued in state courts and so not having waived its sovereign immunity from suit in those courts—would not be bound by the judgment. It might therefore refuse to credit the employer with the amount of tax that the state court had ordered refunded to the employee—and then the employer would be caught in the middle. We do not think that such a result was intended or would be consistent with the system of federal tax collection that Congress has created. The specific illustration that we have given is nixed by 26 U.S.C. § 6401(c), which provides that an overpayment of tax does not lose its character as a tax for which the taxpayer is entitled to a credit or refund merely because he was not liable for *any* part of the tax that was assessed against him. But the principle is broader. When Congress makes a private firm the Internal Revenue Service's "collection agent" (we are not using "agent" in any technical sense), as it has done with the airline tax and other excise taxes, *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co.*,

428 F. Supp. 1297, 1306 (S.D.N.Y. 1977), as well as with payroll taxes, the firm corresponds to an employee of the Service, and a suit for a refund of the taxes that the firm collected—a suit necessarily based on a claim that the taxes were collected in violation of law—is as much a suit for the refund of federal taxes as if it had been brought against the Commissioner of Internal Revenue. (Not that such a suit would lie either, 26 U.S.C. § 7422(f)(1); the only proper defendant is the United States. Our point is only that such a suit would be understood as one for the refund of taxes.) It makes no difference whether the firm is still holding the money it erroneously collected or has passed it on to the IRS. The principal is bound by the agent's act. The IRS has plenty of remedies against its collection agents who fail to remit taxes that they collect. See 26 U.S.C. § 6672(a).

The plaintiff likens this to a case in which a con man, posing as an IRS agent, collects and pockets "taxes" from gullible citizens. The con man's victims would have no action against the IRS, because he was not an agent of the IRS and presumably had not been clothed by it with apparent authority to collect taxes. The victims would have their usual state law remedies against the con man, because they would not be seeking a refund of federal taxes; the con man had not even colorable authority to collect taxes. That is not this case. Southwest, and any customer of Southwest who thought about these matters, had every reason to believe that a last-minute deal between the President and Congress would result in the extension of the tax beyond its December 31 expiration date. The sunset feature of the tax goes back to 1962. Pub. L. No. 87-508, § 5, 76 Stat. 114, 115 (1962). Between 1963 and 1990 Congress had four times extended the air transportation excise tax shortly before (once on the very day) it was due to expire. Pub. L. No. 88-52, § 3(a)(3), 77 Stat. 72 (1963); Pub. L. No. 88-348, § 2(a)(3), 78 Stat. 237 (1964); Pub. L. No. 89-44, § 303(a), 79 Stat. 136, 148 (1965); Pub. L. No. 100-223, § 402(a)(1), 101 Stat. 1486, 1532 (1987); Pub. L. No. 101-508, § 11213(d)(1), 104 Stat. 1388-435 (1990). As

a result, the tax had, as 1995 was drawing to a close, never lapsed since its original imposition in the Revenue Act of 1941, ch. 412, § 554(b), 55 Stat. 687, 721 (1941), though it has now lapsed twice, for after being reimposed in August of 1996 it expired on December 31, 1996, without having been extended. Pub. L. No. 104-188, § 1609(b), 110 Stat. 1755 (1996). It was reimposed on February 28 of this year; and we note that the new statute avoids the refund problem that gave rise to Kaucky's suit by providing that it is applicable not only to transportation beginning during the period covered by the tax (which ends on September 30 of this year) but also to "amounts paid during such period for transportation beginning after such period." Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, amending 26 U.S.C. § 4261(g). If the new statute had been in effect when Kaucky bought his ticket, he would have been liable for tax on it.

Had the tax not lapsed at the end of 1995—and, to repeat, it was a good bet, though as it turned out an erroneous one, that it would not lapse—Southwest would have been in trouble had it failed to collect the tax from customers buying tickets in 1995 for travel in 1996. The airline would have incurred expense and ill will in trying to collect the tax from its customers after they had bought their tickets, and might have faced penalties for failing to collect and remit the tax promptly. See 26 U.S.C. § 6656. In these circumstances, Southwest was exercising colorable authority to collect taxes, even though the collection turned out to be in error. It was almost as if the tax had had no expiration date but in 1997 had been repealed retroactively to 1996.

We are told that the larger airlines kept sufficiently complete records of tickets purchased in 1995 for use in 1996 to be able to refund the excise-tax portion of the ticket price to their customers when the tax was not extended. Assuming those airlines had, like Southwest, paid over this portion of the price to the IRS, they would be entitled to a tax credit for the amount of any refunds that they made to these customers. 26 U.S.C. § 6415(a). This was a fine way to proceed, a way more considerate of

the affected customers than Southwest's method, which interpreted as favorably to the plaintiff as the record will allow involved collecting the tax and remitting it to the IRS and requiring the customer if he wanted a refund to file a claim *with the IRS*. But Southwest's way of proceeding was not so outlandish as to strip the airline of the protection that it enjoys from state-law suits challenging actions done by it in its capacity as a collector of federal excise taxes. The plaintiff was, it is true, denied an opportunity to conduct discovery aimed at finding out whether Southwest had been acting in bad faith. He would have liked to show that Southwest pocketed the money it collected for the nonexistent tax rather than turning it over to the IRS. If that is what happened and people who paid the tax later obtained refunds from the IRS for the money retained by its dishonest collection agent, the IRS would have a number of remedies, criminal as well as civil, against Southwest. E.g., 26 U.S.C. §§ 6672(a), 7202; cf. 26 U.S.C. § 7501; *Begier v. IRS*, 496 U.S. 53, 60-62 (1990). But many people would not bother to seek a refund from the IRS—they would not know that the tax had expired, or would not have retained the receipt for their ticket, or would not have enough at stake to warrant the bother of obtaining and filling out and submitting a claim for a refund—and the money those people erroneously paid on account of the nonexistent tax would lodge in Southwest's pocket.

The case just hypothesized in which the authorized agent turns dishonest is intermediate between the case of the imposter, which we said could be brought under state law, and the case of overpayment, which we said could not be. We may assume without having to decide that the intermediate case should be assimilated to the imposter case rather than to the overpayment case, so that the defrauded customers who had not gotten a refund from the IRS would have a claim against Southwest. This assumption does not carry the day for Kaucky. Although his brief speaks in general terms of Southwest's bad faith, the worst it claims is that Southwest was overconfident in believing that the tax would be extended and

as a result failed to take the prudent measures that the larger airlines took to refund the excise taxes that they collected. This kind of error is no different from an error by an internal revenue agent, an employer, or another statutory collection agent in computing the tax that it is required by law to collect. Money collected in error by a lawful agent, public or private, of the Internal Revenue Service can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund.

We are mindful that section 6415(c) of the Internal Revenue Code provides that airlines required by section 4261 to collect the air transportation excise tax shall, upon proper application, refund any overcollection of the tax that they have made. This provision may be limited to errors in computation and designed only to spare the taxpayer and the Internal Revenue Service the burden of preparing and processing minuscule claims. *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co., supra*, 428 F. Supp. at 1304-05; *Lehman v. USAIR Group, Inc.*, 930 F. Supp. 912, 915 (S.D.N.Y. 1996). Whatever the provision's precise scope, there is no express authorization for suits by taxpayers to enforce it; no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization, cf. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Meghrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1256 (1996); and a practical reason for the courts not to create such an action: it would throw a monkey wrench into machinery designed to confine suits for the refund of federal taxes to suits in the federal courts against the government in order to protect its private as well as public agents from being whipsawed. See *id.*; *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). So this suit cannot be saved by recharacterizing it as a suit to enforce section 6415(c). It is a tax refund suit brought against the wrong party. It was properly removed and properly dismissed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: March 20, 1997

BEFORE:

Honorable RICHARD A. POSNER, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 96-2736

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant

v.

SOUTHWEST AIRLINES COMPANY, a Texas corporation, on behalf of itself and all other entities similarly situated,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 750, James B. Zagel, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Ben Barnow
Barnow and Goldberg, P.C.
105 West Madison Street
Suite 2200
Chicago, IL 60602

Case Number: 1:96-cv-00750
Title: Kaucky v. SW AL Co
Assigned Judge: Honorable James B. Zagel

MINUTE ORDER of 6/14/96 by Hon. James B. Zagel : Plaintiff's motion to alter or [30-1], amend judgment denied [30-2]. Motion for leave to file supplement [29-1], and to supplement motion to alter or amend is granted [29-2]. Motion for reconsideration is denied. Motion to alter or amend judgment is denied. (See reverse of minute order). Mailed notice

This docket entry was made
by the Clerk on June 8, 1996

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by ICMS, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate: James B. Zagel

Case Number: 96 C 750 Date: June 14, 1996

Case Title: KAUCKY V. SOUTHWEST AIRLINES CO.

MOTION: Plaintiff's motion to alter or amend judgment

DOCKET ENTRY:

(1) ☒ Filed motion of [use listing in "MOTION" box above]

* * * * *

(10) ☒ [Other docket entry] Motion denied. Motion (29-1 and 29-2) for leave to file supplement and motion to supplement motion to alter or amend is granted. Motion for reconsideration is denied. Motion to alter or amend judgment is denied.

(11) ☒ [For further detail see order on the reverse of the original minute order form.]

* * * * *

ORDER

Kaucky v. Southwest Airlines
No. 96 C 750 Judge Zagel

The motion to reconsider is denied. The new evidence Kaucky claims would change the result in this case does not change the requirements of 26 U.S.C. § 7422.

/s/ James B. Zagel
United States District Judge

App. 12

[Dated May 16, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

SOUTHWEST AIRLINES CO., a Texas corporation, on behalf of itself and all other entities similarly situated,

Defendants.

No. 96 C 750—Honorable James B. Zagel

MEMORANDUM OPINION AND ORDER

Robert Kaucky filed this class action lawsuit against Southwest Airlines in the Circuit Court of Cook County, Illinois. Southwest removed the case to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. Kaucky then moved to have the suit remanded back to the Circuit Court. This Court denied that motion to remand and the subsequent motion to reconsider the motion to remand. Southwest now moves to dismiss this action.

Kaucky represents a class of persons who purchased airline tickets from Southwest before January 1, 1996, for travel after December 31, 1995. Kaucky paid a federal excise tax which was included in the price of his ticket. This excise tax, 10 percent of the ticket price, was collected by Congressional mandate pursuant to 26 U.S.C. § 4261, which imposes a tax on air transportation. However, the

taxes imposed by this section expired on December 31, 1995, and Congress, in the midst of its budget impasse, failed to renew the tax. 26 U.S.C. § 4261(g). Therefore, any transportation that took place after December 31, 1995 was not subject to the tax. Kaucky seeks, on his own behalf and as representative of a class, the return of the excise tax collected by Southwest for travel after December 31, 1995.

Federal law has imposed an excise tax on air transportation for over forty years. Congress has continually extended the effective date for this tax prior to the enabling legislation's expiration dates. Most recently in 1990, Congress extended the effective date of the act from January 1, 1991 to January 1, 1996. As the expiration deadline approached in 1995, the airlines expected Congress to reenact the tax. In fact, in November 1995, the House and Senate passed legislation that extended the federal excise taxes on air transportation for another six years. This legislation, however, also contained a controversial bill that proposed to alter Medicaid and Welfare, and President Clinton vetoed the bill on December 6, 1995. To date, Congress has not passed any legislation that extends the collection of this tax.

The excise tax is used by the Federal Aviation Administration (FAA) to run this country's air traffic control system and make improvements to airports. It was therefore surprising that this legislation was not passed and most air carrier officials expect Congress will reimpose the tax. Yet, because there is no tax in effect for travel that began on January 1, 1996, passengers who paid the tax for these flights are entitled to a refund. Some airlines have assisted passengers in attaining their refunds by crediting their charge accounts. Others, including Southwest, have required passengers to file their claims for refund with the IRS, using IRS form 8849.

Discussion

A complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Leahy v. Board of Trustees of Community College Dist. No. 508, County of Cook, State of Ill.*, 912 F.2d 917, 921 (7th Cir. 1990), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In analyzing the sufficiency of plaintiff's complaint, the court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Prince v. Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991).

1. Tax Refund

Kaucky claims this suit involves no disputable tax matter, but only alleges breach of common law rules. He asserts this suit falls outside the scope of the internal revenue laws because no tax existed when the law expired and thus the money was improperly collected under the "guise of a tax." However, the language of the Internal Revenue Code makes clear that federal law applies even in a case where a tax is alleged to have been "erroneously or illegally assessed or collected." 26 U.S.C. § 7422(a). Furthermore, this Court has twice rejected Kaucky's argument that only common law issues exist, as I denied the motion to remand and the subsequent motion to reconsider based on the fact that federal law is at issue here.

This case boils down to a simple tax refund suit under 26 U.S.C. § 7422. Although it is clear that Southwest was

not entitled to collect the tax for travel occurring in 1996,[1] the Internal Revenue Code creates procedures to follow when a tax has been improperly collected. Section 7422(a) states:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary . . ."

It is patent that a person must file a claim for refund or credit with the Secretary prior to filing a suit in court for recovery of the money. When that claim is ultimately entitled to be filed in court, it may only be maintained against the United States. 26 U.S.C. § 7422(f)(1).

Kaucky has failed to comply with the procedural requirements of Section 7422 by not alleging that he, or any other member of his class, filed a claim for a refund with the Secretary. *Kuznitsky v. United States*, 17 F.3d 1029, 1031 (7th Cir. 1994) (a party seeking a refund must initially file an administrative claim with the IRS). Even if he were entitled to sue, Kaucky has not sued the appropriate party, the United States. *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co.*, 428 F. Supp. 1297, 1303 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1366 (2nd Cir. 1978) ("section 7422(f) means precisely what it says, and that plaintiffs may maintain a tax refund claim only against the government and not against collecting agents").

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[1] Kaucky alleges that Southwest acted in bad faith collecting monies it knew it had no right to collect. This allegation which we take to be true is probably quite unfair considering the history of the air transportation excise tax which has been continually renewed for over forty years until this fiscal year's budget impasse.

Kaucky argues that even if Section 7422 applies to this case, this Court has jurisdiction because an exception to the procedural requirements exists when money is collected in the "guise of a tax." Kaucky cites two cases.

The first, *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1 (1962), involved 26 U.S.C. § 7421 which prohibits courts from entertaining suits seeking injunctions prohibiting the collection of federal taxes. In dicta, the Court found a statutory exception would exist if "under the most liberal view of the law and the facts, the United States cannot establish its claim" and "equity jurisdiction otherwise exists." *Enochs*, 370 U.S. at 7. *Enochs* would grant this exception when "the exaction is merely in 'the guise of a tax.'" *Id.*

The second case, *Econ, Inc. v. Illinois Bell Tel. Co.*, 351 F. Supp. 1087 (N.D. Ill. 1972), also distinguished in dicta between the collection of an excise tax and an exaction in the guise of a tax. The court in *Econ*, did not define this difference because it found there was enough reason to assume the collection was proper as an excise tax. *Econ*, 351 F. Supp. at 1089. Kaucky says rightly that it cannot be established under the most liberal view of the law and the facts that Southwest's exaction was authorized by the Internal Revenue Code. And thus, the exaction was merely in the guise of a tax and therefore the suit may proceed in federal court under *Enochs* and *Econ*.

These cases do not assist Kaucky. First, *Enochs* carved out a narrow exception for suits seeking injunctive relief. There is a significant difference between seeking an injunction against a tax and seeking a refund of a tax. An injunction is possible only when there is no adequate remedy at law to avoid a future or ongoing harm. When one seeks a tax refund the harm is already complete, and

the procedures set up by the Internal Revenue Code provide an adequate remedy at law to obtain a refund. There is no reason to grant an exception to the statute when seeking a tax refund. Unsurprisingly, the judge in *Econ* explicitly stated that he did not "reach the question whether the *Enochs* rule permits recovery of past 'exactions' in addition to an injunction." *Econ*, 351 F. Supp. at 1089.[2]

Finally, Kaucky spends a great deal of time arguing that requiring this claim to proceed under the Internal Revenue Code contradicts the Code's underlying purpose of ensuring the orderly administration of the revenue and revenue laws. Kaucky's argument defeats itself. First, this is not a claim based on common law issues as Kaucky continues to assert, but a claim for a tax refund, a situation the Code was designed to deal with. Second, Kaucky asserts that the IRS gains nothing by overseeing cases with no impact, relation or effect on the revenue laws, and that allowing this suit would save the IRS from excess paperwork and from reviewing individual claims. These arguments are wholly without merit and in fact turn the issue on its head. By attempting to sue in court, Kaucky has simply shifted the burden from the Internal Revenue Service to the federal court system. Kaucky, and all others similarly situated, seeks a simple result in this case, the refund of taxes paid prior to January 1, 1996 for air travel

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[2] Kaucky also asserts that *Econ* indicates suits can be brought against defendants other than the United States. In fact, *Econ* implies just the opposite when it informs the plaintiff how to obtain an authoritative determination on the issue by a federal court. "[H]e may have one by filing a claim for a refund with the Internal Revenue Service and, upon its denial, institut[e] a suit in the district court *against the United States directly as the real party in interest.*" *Econ*, 351 F. Supp. at 1089 (emphasis added).

that occurred after December 31, 1995. There is a simple resolution to this matter, file form 8849 with the IRS. It is an easy form to fill out, and like thousands of other airline passengers in Kaucky's position, he is almost certain to get his refund. The IRS procedures are efficient and of minimal cost. On the contrary, by insisting on a lawsuit, resolution of this matter has been delayed at significantly greater expense to both the parties involved and the judicial system.

2. Preemption

Kaucky asserts common law claims for breach of contract and conversion. However, these claims are preempted by 49 U.S.C. § 41713(b)(1) (1995) (formerly the Airline Deregulation Act of 1978, 49 U.S.C. § 1305(a)(1)). Section 41713(b)(1) provides:

> a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier . . . .

Both the breach of contract and conversion claim "relate" to Southwest's ticket prices within the meaning of this section. Both claims expressly refer to the collection of the air transportation excise tax. The excise tax, which is ten percent of the ticket price, 'relates to price' because it directly impacts the ticket price. *Statland v. American Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 603 (1993) (challenged practice of withholding ten percent of federal tax on canceled tickets relates to rates.)

Kaucky argues that the breach of contract claim falls within the exception drawn by the Supreme Court in *American Airlines Inc. v. Wolens*, 115 S.Ct. 817, 826 (1995), which does not preempt a claim for breach of a

contract term when set by the airline itself. Kaucky asserts that the collection of money was not imposed by federal statute or regulation, but was a self-imposed undertaking by Southwest. While the air transportation excise tax did expire for travel beginning on January 1, 1996, Southwest only collected the money in anticipation of the tax being revived. When the law imposing the excise tax ultimately expired on December 31, 1995, Southwest stopped charging for it. Thus, while the money may have been improperly collected, it related to airline ticket prices.

Kaucky finally argues that the conversion claim is protected by the holding in *Travel All Over the World, Inc. v. The Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), because the conversion count makes no express reference to rates (price), routes, or services. Yet I have already concluded that this count does refer to price since it expressly refers to the collection of the excise tax.

Conclusion

Kaucky's sole remedy is to file for a refund with the IRS. Approximately 33,000 other individuals, who paid this excise tax in 1995 and flew in tax-free 1996, have already filed their refund claims with the United States. Kaucky must follow the same route. Because Kaucky has not yet filed his claim for a refund with the IRS, and because his only source of relief is against the United States, Southwest's motion to dismiss is granted.

Enter:

/s/ James B. Zagel
United States District Judge

Date: May 16, 1996

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

ROBERT G. KAUCKY

v. Case No. 96 C 750

SOUTHWEST AIRLINES CO.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendant's motion to dismiss for lack of jurisdiction is granted. This case is dismissed with prejudice and without costs.

May 16, 1996
Date

H. Stuart Cunningham
Clerk

/s/ Donald R. Walker
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

H. Stuart Cunningham
CLERK

Office of the Clerk

Ben Barnow
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105 West Madison Street
Suite 2200
Chicago, IL 60602

Case Number: 1:96-cv-00750
Title: Kaucky v. SW AL Co
Assigned Judge: Honorable James B. Zagel

MINUTE ORDER of 2/22/96 by Hon. James B. Zagel : Status hearing set for 10:00 4/18/96. Denying motion to remand to Circuit Court of Cook County [10-1], Denying motion and for attorney fees [10-2] and costs [10-3]. Service of motion to dismiss for lack of jurisdiction plaintiff's class complaint [8-1] due 2/26/96. Service of answer brief due 3/21/96. Service of reply to answer brief due 4/4/96. No notice (rm)

This docket entry was made
by the Clerk on March 3, 1996

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 15, 1997

Before

Honorable RICHARD A. POSNER, Chief Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable ILANA DIAMOND ROVNER, Circuit Judge

ROBERT G. KAUCKY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

No. 96-2736 v.

SOUTHWEST AIRLINES COMPANY, on behalf of itself and all others similarly situated,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 750—James B. Zagel, *Judge*.

ORDER

On April 3, 1997, plaintiff-appellant filed a petition for rehearing. All the judges on the original panel have voted to deny the petition. The petition is therefore DENIED.